

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

WILLIAM MERRIWEATHER

Petitioner,  
vs.

No. 99-CV-75306-DT  
6th Cir. No. 07-2063  
Hon. Gerald E. Rosen

JERRY HOFBAUER,

Respondent.  
\_\_\_\_\_ /

ORDER DENYING CERTIFICATE OF APPEALABILITY

At a session of said Court, held in  
the U.S. Courthouse, Detroit, Michigan  
on November 19, 2007

PRESENT: Honorable Gerald E. Rosen  
United States District Judge

This matter is presently before the Court pursuant to the Order of United States Court of Appeals for the Sixth Circuit remanding this case for the sole purpose of determining whether to grant or deny Petitioner William Merriweather a certificate of appealability in connection with the appeal Merriweather proposes to file with the Sixth Circuit of this Court concerning the denial of his July 26, 2007 Fed. R. Civ. P. 60(b) motion for relief from judgment. Merriweather's Rule 60(b) motion was targeted at the Court's August 31, 2001 Opinion and Order and Judgment denying his petition for a writ of habeas corpus. Merriweather attempted to appeal that August 2001 decision but the Sixth Circuit Court of Appeals denied him a certificate of appealability and his petition for a writ of certiorari was denied by the Supreme Court in December 2002.

Four years later, Petitioner filed a Rule 60(b) motion renewing his request for a reversal of this Court's 2001 ruling contending that the Court erred in ruling on his petition for a writ of habeas corpus without first expressly ruling on, in separate orders, three of his other earlier motions for appointment of counsel, for evidentiary hearing, and to amend/correct his reply (erroneously captioned as a response) to the State's response, and fourth motion -- filed after the Magistrate Judge issued his Report and Recommendation and after Petitioner filed his Objections to the R&R -- asking the Court to remand the case to the Magistrate Judge for a ruling on his pre-R&R motions.

Merriweather brought his Rule 60(b) motion under subsections (1), (2) and (4) of that rule. Subsections (1) and (2) of Rule 60(b) require that a motion seeking relief under those subsections be filed within one year of the judgment; subsection (4) requires that the motion be filed "within a reasonable time." Because Merriweather's motion was filed more than six years after the judgment was entered, the Court determined that motion was not timely filed in accordance with the requirements of Rule 60(b), and therefore, denied the motion.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court articulated the legal standard to be used in determining whether to issue a certificate of appealability (formerly known as a "certificate of probable cause.") The Court stated in that case that "a certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" *Id.* at 893 (citations omitted). It went on to say:

[T]he petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner] or that the questions are "adequate to deserve encouragement to proceed further."

*Id.* at 893, n.4.

The *Barefoot v. Estelle* standard was incorporated in the federal habeas statutes with the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“ADEPA”) and its amendments of the statutes governing habeas corpus actions. *See*, 28 U.S.C. § 2253(c)(2) (certificates of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.”). *See also*, *Lyons v. Ohio Adult Parole Authority*, 105 F.3d. 1063 (6th Cir. 1997).

This Court finds that Petitioner Merriweather has not satisfied the *Barefoot v. Estelle* standard for purposes of appealing the denial of his Rule 60(b) motion. The Court’s determination that Petitioner’s motion was not timely filed is not “debatable among jurists of reason.” Accordingly,

IT IS HEREBY ORDERED that no certificate of appealability should issue for purposes of Petitioner Merriweather’s proposed appeal of the Court’s denial of Fed. R. Civ. P. 60(b) motion.

s/Gerald E. Rosen  
Gerald E. Rosen  
United States District Judge

Dated: November 19, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on November 19, 2007, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry  
Case Manager